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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1961

No. 834

SIMONE SCOZZARI,
Petitioner,

vs.

GEORGE K. ROSENBERG, District Director for Immigration and Naturalization Service, Los Angeles, California,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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The petitioner, Simone Scozzari, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the lower Court's dismissal of a petition for review filed in the case of your petitioner.

OPINIONS BELOW

The decision of the District Director, Immigration and Naturalization Service, Los Angeles, California, denying petitioner's application for adjustment of status under Section 249 of the Immigration and Nationality Act (8 USCA 1259) is printed at pages 56 through 59 in the Transcript of Record. The order of the Acting Regional Commissioner, Southwest Region, Immigration and Naturalization Service, is printed at pages 60 through 62 in the Transcript of Record. The order of the District Court (without opinion) dismissing said petition for review is printed at pages 8 through 15 in the Transcript of Record. The opinion of the Court of Appeals for the Ninth Circuit has not as yet been officially reported, but is printed in Appendix A, pages i-iii, attached hereto.

JURISDICTION

The judgment of the Court of Appeals was filed and entered on January 26, 1962. Appendix B, hereto, p. iv. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Is a deportable alien who files an application for adjustment of status to that of a lawful permanent resident, pursuant to the provisions of Section 249 of the Immigration and Nationality Act, entitled to a hearing which meets the Constitutional requirements of procedural due process of law?

2. Is an order denying an application, committed to administrative discretion, arbitrary and capricious where such order is based on non-confidential evidence dehors the record?

STATUTES INVOLVED

Section 249 of the Immigration and Nationality Act, as amended August 8, 1958 by Public Law 85-616, 72 Stat. 546, 8 USCA 1259:

"Record of admission for permanent residence in the case of certain aliens who entered the United States prior to June 28, 1940.

A record of lawful admission for permanent residence may, in the discretion of the Attorney General, and under such regulations as he may prescribe, be made in the case of any alien, as of the date of the approval of his application, or, if entry occurred prior to July 1, 1924, as of the date of such entry, if no such record is otherwise available and such alien shall satisfy the Attorney General that he is not inadmissible under section 1182(a) of this title insofar as it relates to criminals, procurers and other immoral persons, subversives, violators of the narcotic laws or smugglers of aliens, and he establishes that he—

(a) entered the United States prior to June 28, 1940;

(b) has had his residence in the United States continuously since such entry;

(c) is a person of good moral character; and

(d) is not ineligible to citizenship."

STATEMENT OF THE CASE

Petitioner is an alien, a native and citizen of Italy, who entered the United States as a stowaway in about 1923. On January 21, 1958, respondent served upon petitioner an order to show cause and notice of hearing in deportation proceedings. Upon insistence of counsel, the matter was continued by respondent until January 31, 1958, at which time a hearing in deportation proceedings was conducted by subordinate officials of the respondent herein. At the conclusion of that proceeding, it was directed that petitioner be deported from the United States.

On appeal from said adverse decision, the Board of Immigration Appeals inter alia, under date of July 2, 1958, directed that the case of petitioner herein be remanded to the Immigration and Naturalization Service for the purpose of affording petitioner an opportunity to file an application to create a record of lawful entry into the United States for permanent residence, pursuant to the provisions of Section 249 of the Immigration and Nationality Act (8 U.S.C.A. 1259). Pursuant to such order, on September 8, 1958 petitioner filed, on an appropriate form provided by the Immigration and Naturalization Service, an application to create a record of admission for permanent residence under Section 249 of the Immigration and Nationality Act (T. 16-19). In connection therewith, petitioner was questioned on December 10, 1958 (T. 21-50). In support of his claim, petitioner submitted the Certificate of his Marriage to a United States citizen (T. 52), and the birth record of his

wife (T. 51). Two witnesses who personally appeared at the Los Angeles Office of the Immigration and Naturalization Service on the same date were interrogated and affidavits were executed by them (T. 54-56). Without any further proceedings or offering petitioner an opportunity to present evidence, the District Director, Immigration and Naturalization Service, Los Angeles, on March 6, 1959 denied said application for numerous reasons which find no support whatsoever in the record (T. 56-59), and this decision was thereafter affirmed by the Acting Regional Commissioner, following appeal, on April 1, 1959 (T. 60-62). This action was filed in the United States District Court seeking review of the foregoing administrative process (T. 3-5).

REASONS FOR GRANTING CERTIORARI

This writ of Certiorari is sought because the issues presented herein raise important Constitutional questions regarding due process of law as well as important questions pertaining to the administration of the immigration and nationality laws of the United States. In addition, the decision below is in conflict with decisions of this Court and contrary to decisions of other Circuits.

I. THE DECISION OF THE COURT BELOW, IN EFFECT, HOLDS THAT THE IMMIGRATION AND NATURALIZATION SERVICE NEED NOT CONDUCT A HEARING THAT MEETS THE MINIMUM REQUIREMENTS OF PROCEDURAL DUE PROCESS OF LAW WHEN CONSIDERING AN APPLICATION FOR ADJUSTMENT OF STATUS COMMITTED TO ADMINISTRATIVE DISCRETION.

The Fifth Amendment to the Constitution of the United States provides that "no person shall * * * be deprived of life, liberty or property, without due process of law * * *". An alien, even though here illegally, is entitled to a full and fair hearing which conforms to the traditional standards encompassed in procedural due process of law.

Galvan v. Press, 347 U.S. 522, 530;

Shaughnessy v. U.S., ex rel Ignato Mezei, 345 U.S. 206, 212;

Kwong Hai Chew v. Colding, 344 U.S. 590, 598;

Wong Yang Sung v. McGrath, 339 U.S. 33, 49, 50;

Japanese Immigrant Case (Yamataya v. Fisher), 189 U.S. 86, 100.

If the Government's contention is correct, it would mean that the Immigration and Naturalization Service has a power greater than Congress, through whom the Service derives its authority. It would mean that that administrative body could either grant beneficial relief or deny the benefits thereof without developing all of the facts pertaining thereto.

In *Kwong Hai Chew v. Colding*, 344 U.S. 590, at pages 596-597, this Court held:

"He may not be deprived of his liberty or property without due process of law. Although it may be later established as respondents contend, that petitioner can be expelled and deported, yet, before his expulsion he is entitled to notice of the nature of the charge and a hearing at least before an executive or administrative tribunal. Although Congress may prescribe conditions for his expulsion and deportation, not even Congress may expel him without allowing him a fair opportunity to be heard."

In *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49, this Court stated:

"The Constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every enactment of that body."

In *Bridges v. Wixon*, 326 U.S. 135, this Court stated at page 154:

"Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."

In *Han Lee Mao v. Brownell*, 207 F. 2d 142, 146, the Court of Appeals for the District of Columbia considered the Constitutionality of the Attorney General's failure to accord that plaintiff a hearing on his right to depart from the United States. There, the Court stated:

"The case turns on the question whether a due process hearing is a condition precedent to an

> order permitting Mao, who is not an enemy, to leave the country. The fact that the Passport Act does not in terms require the Attorney General to grant a hearing before denying exit permission does not necessarily mean that the alien is not entitled to be heard, for if the Constitution requires a hearing, the statute must be read as commanding that it be afforded."

The Court of Appeals for the Second Circuit, in the case of *United States ex Murff*, 260 F. 2d 610, when considering a case involving a Hungarian refugee granted temporary parole into the United States at the discretion of the Attorney General, concluded that a hearing was required prior to revocation of parole, stated at page 615:

> "However, the grave Constitutional implications of a decision that appellant is not entitled to the hearing he seeks are clear. Were the views advanced by the Government adopted it is difficult to see how the statute, interpreted to authorize deportation of appellant without a hearing on the merits, could satisfy the requirements of due process."

Petitioner's application for adjustment of status presented a substantial issue which could only be determined after a full and complete hearing. Certainly, by no stretch of the imagination, can it be concluded that informal interrogation by an investigator meets the prescribed standards of administrative conduct.[1]

[1] New regulations, effective January 23, 1962 (26 Fed. Reg., No. 203, pages 9858-9860) transferred to Special Inquiry Officers authority to decide applications for adjustment of status under Section 245 and 249 of the Immigration and Nationality Act.

Failure to grant a quasi-judicial hearing which conforms to the traditional safeguards of due process is fatal. Irregular or nonconforming procedural practices are violative of the essence of liberty, as set forth in the Constitution of our nation. This administrative practice, even though established with the best of intentions, should be curtailed.

It is inconceivable that a practice denying an alien a hearing without fair notice of the charges, an opportunity to know what evidence is offered or considered, an opportunity to explain or refute or the benefit of confrontation should be condoned by this Court. The warning of Mr. Chief Justice Vinson in *Stack v. Boyle*, 342 U.S. 1, 6, that we should not "inject into our own system of government the very principles of totalitarianism which Congress was seeking to guard against * * *" is particularly appropriate in the setting of the instant case. In effect, the decision of the Court below, contrary to *Price v. Johnson*, 334 U.S. 266, 291, made a "factual determination" that petitioner was granted a fair hearing "where the crucial facts have not been developed."

Also compare:

Walker v. Johnson, 312 U.S. 275, 285, 287;
Holiday v. Johnston, 313 U.S. 342, 350.

The decision of the Court below holds that this alien, and other aliens similarly situated, can be denied statutory administrative relief without a formal hearing. This is an issue which involved substantial Constitutional rights which should be resolved by this Court.

2. **THE DECISION OF THE COURT BELOW HOLDS THAT THE IMMIGRATION AND NATURALIZATION SERVICE MAY IN ALL MATTERS CONSIDER EVIDENCE DEHORS THE RECORD.**

The decision of the Court of Appeals involves an important question of Federal law which has not been but should be settled by this Court.

In the case of *Jay v. Boyd*, 351 U.S. 345, this Court stated at pages 357-358:

> "As we have already stated, suspension of deportation is not given to deportable aliens as a right, but, by Congressional direction, it is dispensed according to the unfettered discretion of the Attorney General. In the face of such a combination of factors we are constrained to construe the statute as permitting decisions based upon matters outside the administrative record at least when such action would be reasonable."[8]

It would appear that the Court intended to limit the cited rule to those cases where "the disclosure * * * would be prejudicial to the public interest, safety, or security".

In *Kessler v. Strecker*, 307 U.S. 22, at page 34, this Court stated:

> "If the hearing was fair, if there was evidence to support the finding of the Secretary and if no error of law was committed, the rule of the Department must stand and can not be corrected in judicial proceedings. If, on the other hand, one of the elements is lacking, the proceeding is void and must be set aside."

[8] However, compare *Peters v. Hobby*, 349 U.S. 331; *Vitarelli v. Seaton*, 359 U.S. 535, and *Greene v. McElroy*, 360 U.S. 474.

The same rule was expressed by this Court in the case of *Kwock Jan Fat v. White*, 253 U.S. 454, 464, 40 S. Ct. 566, 570:

> "It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the traditions and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts, on proceedings for review, within limits amply defined in the cases cited, to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which executive officers proceed to judgment."

The administrative decision was arbitrary and capricious and not supported by the evidence. The District Director stated that "the applicant attended a meeting * * * in Apalachin, New York and was one of some sixty individuals in attendance who were questioned by the Police as to the purpose of the meeting. Police departments have described the persons who attended as representative of the criminal element in the United States. The applicant was accompanied to Apalachin, New York by Frank Desimone, a well-known figure among the criminal elements in Southern California who was recently convicted of contempt of Court * * *. * * * The applicant admits association with many other persons publicly known to have police records" (T. 59). The administrative record fails to show petitioner's association with any or all of the named individuals, nor is there any evidence in the record to show that the

petitioner participated in any of their past or present activities. More important, there is nothing in the record to show the period of association, the extent of such association or petitioner's knowledge concerning the background or records of the parties concerned. See *U.S. v. Buffalino*, 2 Cir., 285 F. 2d 408. There is no evidence of record to establish that Frank Desimone was a well-known figure among the criminal element in Southern California nor that he was recently convicted of contempt of Court, if that at all has any bearing on this case.

Though not specifically set forth, it is evident that the decision of the Regional Commissioner is founded upon the same ground. The petitioner did not have a full and fair opportunity to establish his claim. Due process of law assures, at the least, that one entitled thereto will be afforded those procedures which accord him the "rudiments of fair play". *Chicago M. & St. Paul R. Co. v. Poll*, 232 U.S. 165, 168.

In *Morgan v. United States*, 304 U.S. 1, at pages 14-15, this Court stated:

> "* * * liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand a full and open hearing essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.'"

At page 21 thereof:

> "While we are not now dealing with the merits, the breadth of the Secretary's discretion under our rulings applicable to such a proceeding * * * places in a strong light the necessity of maintaining the essentials of a full and fair hearing, with the right of the appellants to have a reasonable opportunity to know the claims advanced against them * * *."

There is no point in having an administrative hearing and preserving a full record thereof if it is possible for an administrative agency to exercise its discretion on matters outside of the record. If such were the case, that hearing would be nothing but a sham. Any delegated executive power is subject to conformance with the due process clause of the Fifth Amendment. *Ex parte Endo*, 323 U.S. 283. Any exercise of discretion must be consistent "with the fundamental principles of justice embraced within the conception of the due process of law." *Tang Tun v. Edsell*, 223 U.S. 673. *Joint Fascist Refugee Comm. v. McGrath*, 341 U.S. 123; *Carlson v. Landon*, 342 U.S. 524.

Improper and illegal consideration of matters outside the record so taints these proceedings that the decision is an arbitrary and capricious abuse of discretion. The Court below, contrary to these recognized principles, concluded otherwise.

CONCLUSIONS

If the fate of this petitioner alone were at stake, the case might be of small account. It is our entire democratic processes themselves that are involved. Procedural due process are not mere catchwords—they are guides for conduct which protect certain basic human rights. To prevent the abuse of the extraordinary powers granted the Immigration and Naturalization Service, judicial intervention is appropriate herein. The decision below is in conflict with decisions of this Court and with rules prevailing in other Circuits.

Whether the Immigration and Naturalization Service may consider confidential evidence outside an official record involves an important question of federal procedure and practice. Denial of such an application without a hearing which meets the minimum requirements of procedural due process of law is tantamount to banishment and exile, contrary to the principles of our form of government.

For the reasons set forth, it is respectfully submitted that this petition for writ of Certiorari should be granted.

Dated, San Francisco, California,
March 28, 1962.

Respectfully submitted,
JOSEPH S. HERTOGS,
Attorney for Petitioner.

G. NARSON BRUMBAUGH,
Of Counsel.

(Appendices "A" and "B" Follow)

Appendix "A"

United States Court of Appeals for the Ninth Circuit

SIMONE SCOZZARI,

Appellant,

vs.

GEORGE K. ROSENBERG, District Director Immigration and Naturalization Service, Los Angeles, California,

Appellee.

No. 17,349

Jan. 26, 1962

Appeal from the United States District Court for the Southern District of California Central Division

Before: CHAMBERS, BARNES and HAMLEY, Circuit Judges.

CHAMBERS, Circuit Judge:

Scozzari, a citizen of Italy, came into the United States as a stowaway on a boat in 1923. He seems to have been free of problems with the Immigration Service until 1958, when administrative proceedings were commenced on his deportability. Such proceedings were concluded in 1959. The order was that he be deported. Merged into the proceedings was an application to create a record of Admission for Perma-

nent Residence under Section 249* of the Immigration and Nationality Act. This application was denied on the ground that Scozzari had failed to establish that he was a person of good moral character.

Administrative proceedings exhausted, Scozzari sought a review by declaratory judgment in the United States District Court for the Southern District of California. There the trial judge after an examination of the immigration file, granted a motion for summary judgment.

In its findings and conclusions, the court found that there was reasonable, substantial and probative evidence to support the administrative finding that Scozzari had failed to establish he is a person of good moral character, a prerequisite for the grace of Section 249. It was further found that the administrative determinations were not arbitrary, capricious and that there was no abuse of discretion.

On appeal, we agree.

Segregating each facet of appellant's record in this country and inspecting it might lead one to think perhaps that the immigration authorities were unduly strict. But the totality of the record would indicate that the denial of the grace of the statute was eminently proper, assuming that a determination under Section 249 is subject to full review. (This we do not decide.)

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*Section 249 of the Immigration and Nationality Act, 66 Stat. 219, as amended by Public Law 85-616, 72 Stat. 546, 8 U.S.C.A. § 1259.

The government's evidence was sufficient as a basis for denial. And, the evasiveness and improbability of some of appellant's answers under oath at one of the hearings are something that even an appellate court can see.

Appellant asserts a lack of due process. We find none.

Judgment affirmed.

(Endorsed) Opinion Filed Jan. 26, 1962.

Frank H. Schmid, Clerk.

Appendix "B"

United States Court of Appeals
For the Ninth Circuit

SIMONE SCOZZARI, *Appellant,* vs. GEORGE K. ROSENBERG, District Director Immigration and Naturalization Service, Los Angeles, California, *Appellee.*	No. 17,349

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, it is nowhere ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered January 26, 1962.